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Nos. 88-1198 and 88-1393

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In the Supreme Court of the United States

OCTOBER TERM, 1988

FEDERAL TRADE COMMISSION, PETITIONER

v.

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, ET AL., CROSS-PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION

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QUESTIONS PRESENTED

1. Whether a naked price-fixing boycott undertaken by economic competitors as part of a larger public campaign to obtain an increase in fees paid to them by the government is immunized from all antitrust scrutiny by the First Amendment.

2. Whether a naked price-fixing boycott undertaken by economic competitors as part of a larger public campaign to obtain an increase in fees paid to them by the government is shielded from *per se* prohibition under the Sherman Act (15 U.S.C. 1), on the ground that the boycott constitutes expressive conduct protected by the First Amendment.

3. Whether, assuming that the *per se* rule of illegality does not apply, an antitrust plaintiff must satisfy any required showing of market power by offering proof apart from the boycotters' successful effort to restrict the output of, and increase the price for, the service they offer.

PARTIES TO THE PROCEEDINGS

Respondents and cross-petitioners, all of whom were respondents in the proceedings before the Federal Trade Commission, include the Superior Court Trial Lawyers Association, Ralph J. Perrotta, Karen E. Koskoff, Reginald G. Addison, and Joanne D. Slaight.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-61a)[1] is reported at 856 F. 2d 226. The opinion and final order of the Federal Trade Commission (Pet. App. 64a-138a) and the initial decision of the administrative law judge (Pet. App. 139a-229a) are reported at 107 F.T.C. 510.

JURISDICTION

The judgment of the court of appeals (Pet. App. 62a) was entered on August 26, 1988. A petition for rehearing

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[1] All references to "Pet. App." are to the Appendix to the petition filed in No. 88-1198.

was denied on October 25, 1988 (Pet. App. 63a). The petitions for certiorari were filed respectively on January 23, 1989 (No. 88-1198) and February 22, 1989 (No. 88-1393), and granted on April 17, 1989. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The First Amendment to the Constitution, Section 1 of the Sherman Act, 15 U.S.C. 1, and Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1), are set forth at Pet. App. 230a.

STATEMENT

1. This case involves a successful boycott by competing private-practice attorneys, who refused to provide their services to the District of Columbia unless they were paid a higher price. The attorneys were members of respondent Superior Court Trial Lawyers Association (SCTLA), an organization of attorneys registered to accept case assignments under the Criminal Justice Act, D.C. Code Ann. §§ 11-2601 *et seq.* (1981 & Supp. 1988) (the CJA).[2] The CJA provides for appointment of private counsel to represent indigent persons charged with crimes in the District of Columbia Superior Court.

CJA attorneys represent approximately 85% of all Superior Court defendants who are unable to afford counsel.[3] Any member in good standing of the D.C. Bar

[2] Respondents Ralph J. Perrotta, Karen E. Koskoff, Reginald G. Addison, and Joanne D. Slaight are or were District of Columbia attorneys with practices consisting primarily of CJA assignments. All were leaders of the challenged SCTLA boycott. (Pet. App. 77a-82a, 148a-151a.)

[3] Another 8-10% (generally in more serious cases) are represented by the Public Defender Service, and the rest by third-year law students (3-5%) and *pro bono* private attorneys (under .5%) (Pet. App. 3a).

with a local address and phone number may register with the CJA office of the Public Defender Service (PDS) to receive appointments, and some 1200 attorneys have so registered. In practice, however, most appointments go to a much smaller group of about 100 CJA "regulars." These attorneys frequently seek appointment to handle CJA cases and earn most or all of their income from them. (Pet. App. 3a-4a.)

From 1970 until 1983, CJA case fees were $30 per hour for court time and $20 per hour for other time, subject to a per-case maximum of $1000 for felonies, $400 for misdemeanors, and $1000 for appeals (Pet. App. 4a). These fees were equal to the maximum rate then being paid by the federal government for representation of indigent defendants in federal court.[4] Although CJA fees had remained constant for thirteen years and participation in the CJA program was strictly voluntary, the overall quality of representation "improved markedly" during this period (*id.* at 166a, 112a n.117). Indeed, "[c]ounsel for [the SCTLA lawyers] acknowledged * * * that the pre-boycott level of services was adequate to secure the Sixth Amendment rights of their clients" (*id.* at 30a). Nevertheless, as early as 1975, the level of CJA fees had become a matter of concern among some members of the bar (*id.* at 5a).

Beginning in 1982, various CJA attorneys acting through the SCTLA mounted a collective lobbying effort to increase CJA compensation levels. In seeking to justify a rate increase for themselves, the lawyers argued, *inter alia*, that the public, including indigent defendants, would benefit from such an increase. In March 1983, D.C. City

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[4] The CJA (D.C. Code Ann. § 11-2604(a) (1981 & Supp. 1988)) provided for compensation of attorneys "at a rate fixed by the Joint Committee on Judicial Administration, not to exceed the hourly scale established by [the federal statute for appointed counsel, 18 U.S.C. 3006(d)(1)]." (See Pet. App. 73a n.13.)

Council Chairman David Clarke introduced a bill to increase CJA rates to $35 per hour. Although several witnesses testified in favor of the bill, the Executive Branch of the D.C. Government raised financial concerns, and as of August 1983 no legislation had been enacted. (Pet. App. 6a-7a.)

Dissatisfied with their lobbying efforts, CJA lawyers formed the "SCTLA Strike Committee," chaired by respondent Slaight, to consider other means of obtaining a fee increase (Pet. App. 7a-8a).[5] On August 11, 1983, a group of about 100 CJA lawyers met and agreed to refuse new CJA case assignments unless the D.C. Government increased CJA rates by September 6, 1983. The lawyers memorialized their agreement by posting a petition in the lawyers' lounge of the D.C. Superior Court. The petition, signed by numerous CJA attorneys, stated (*id.* at 8a):

> We, the undersigned private criminal lawyers practicing in the Superior Court of the District of Columbia, agree that unless we are granted a substantial increase in our hourly rate we will cease accepting new appointments under the Criminal Justice Act.

Respondent Perrotta also sent a letter to 40 D.C. law firms that had previously indicated a willingness to do pro bono work, urging them not to accept CJA cases if a boycott ensued (*id.* at 9a).

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[5] SCTLA has often referred to the collective refusal of its members to accept new case assignments as a "strike." However, the CJA lawyers – independent entrepreneurs engaged in the private practice of law – were not D.C. government employees, nor has SCTLA ever suggested that it is a "labor organization" for purposes of the so-called "labor exemption" to the antitrust laws (Pet. App. 7a n.6). Had the CJA attorneys been D.C. government employees "on strike," they would have been subject to criminal fines and imprisonment for their conduct. See 5 U.S.C. 7311; 18 U.S.C. 1918.

When the District of Columbia government did not increase CJA reimbursement rates as the lawyers had demanded, the CJA attorneys implemented the boycott as planned. The boycott, which began on September 6, 1983, and included among its adherents nearly all CJA "regulars," had a "severe impact on the criminal justice system" (Pet. App. 9a). PDS attorneys and the few other bar members who volunteered to accept new case assignments could not keep pace with the flow of new cases. On September 15, "convinced that the system was on the brink of collapse" (*id.* at 197a), the PDS leadership wrote to Mayor Barry urging him to support legislation increasing CJA rates.[6]

The Mayor met that evening with respondents Koskoff, Perrotta, and Addison, and agreed to support Councilman Clarke's bill. On September 20, 1983, the D.C. City Council passed the bill unanimously, and on September 21, 1983, the CJA attorneys began accepting new assignments. (Pet. App. 10a-11a.) The cost of funding the CJA rate increase was estimated to be $4-5 million per year at the time of the boycott (*id.* at 206a).

2. On December 16, 1983, the Federal Trade Commission (Commission) issued a complaint alleging that the CJA lawyers' concerted refusal to accept new case assignments unless the District increased its price constituted "a conspiracy to fix prices and to conduct a boycott" in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45 (Pet. App. 11a, 141a).[7]

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[6] Chief Judge Moultrie also advised the mayor that the criminal justice system was approaching a crisis point. Separately, in a letter to the president of the D.C. Bar, Judge Moultrie noted that he was "unalterably opposed to a strike or an organized boycott as a method to bring about the needed changes." (Pet. App. 81a & n.47.)

[7] The "[u]nfair methods of competition" proscribed by Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1), in-

The administrative law judge (ALJ) to whom the case was assigned held hearings and entered an initial decision dismissing the complaint (*id.* at 139a-229a).

The ALJ recognized that respondents expected their boycott to "have a severe impact on the District's criminal justice system," and he noted that "[t]his expectation was fully realized," in part because "there was no one to replace the CJA regulars, and makeshift measures were totally inadequate" (Pet. App. 195a-196a). The ALJ rejected respondents' claim that they lacked market power, finding that contention "contradicted by the entire record" (*id.* at 205a). The ALJ also rejected the SCTLA lawyers' claim that their conduct was a form of "political action" protected by *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982), or "political petitioning" immune from antitrust scrutiny under *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) (Pet. App. 11a, 209a-216a, 228a).

The ALJ nevertheless dismissed the complaint because, in his view, "there was no harm done" (Pet. App. 227a). The ALJ surmised that "city officials" favored a fee increase for the CJA lawyers. Because a boycott was the only means to induce the City Council to effect what these "city officials" and others deemed proper public policy, the ALJ concluded that "it cannot be presumed that the higher costs attributable to the 1983 boycott are adverse effects" (*id.* at 227-228a.)

The Commission unanimously reversed (Pet. App. 69a-138a). The Commission explained that "[t]he purpose of the boycott was to increase fees" and that the boycott had "succeeded in forcing the city to increase CJA fees"

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clude restraints of trade that violate Section 1 of the Sherman Act, 15 U.S.C. 1. See *FTC* v. *Cement Institute*, 333 U.S. 683, 693 (1948). The Commission applied Sherman Act precedents in reaching its decision.

(*id.* at 87a-88a). "Such concerted action to raise prices," the Commission added, "has consistently been held unlawful by the courts" (*id.* at 88a). The Commission found respondents' boycott unlawful, both under a *per se* rule (*id.* at 87a-92a), and under the rule of reason (*id.* at 92a-98a).[8] Finally, the Commission held that respondents' conduct was not immunized by the First Amendment—either by the *Noerr* doctrine or by *Claiborne Hardware* (*id.* at 103a-132a). The Commission therefore entered a cease and desist order designed to prohibit SCTLA and the named individual respondents "from initiating another boycott to raise the CJA fees whenever they become dissatisfied with the results or pace of the city's legislative process" (*id.* at 136a).

3. The court of appeals reversed the Commission's decision and remanded the case for determination whether the boycotting CJA attorneys possessed market power (Pet. App. 1a-61a). The court recognized that the SCTLA boycott was "the essence of 'price-fixing' " and a "classic restraint of trade" (*id.* at 16a) that, if "viewed through the ordinary lens of antitrust law" (*id.* at 15a), would "properly be condemned as a *per se* violation of Section 1 of the Sherman Act" (*id.* at 32a).[9] The court also rejected the

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[8] In so holding, the Commission rejected the " 'knowing wink' defense" that had appealed to the ALJ (Pet. App. 98a; see n. 40, *infra*). It stated that "[t]he record shows that the District government increased the fees for lawyers under its CJA program only when it was coerced by the respondents to do so" (*id.* at 96a). In any event, the Commission continued, "the acquiescence or support of some members of the city government would not immunize the [SCTLA] boycott to increase prices from the antitrust laws" (*id.* at 97a).

[9] The court noted that the lawyers' price-fixing boycott was a "naked" restraint of trade, *i.e.*, it was not ancillary to any efficiency-producing integration of functions by competitors. Although judicial treatment of so-called "ancillary" restraints has varied, the court recognized that there has never been a change in the rule that such

SCTLA lawyers' reliance on the *Noerr* doctrine. The court explained that, unlike in *Noerr*, the market restraint here "resulted from private, rather than governmental, action" (*id.* at 37a) and that the lawyers "did not 'confine [themselves] to efforts to persuade,' " but rather " 'organized and orchestrated' a concerted effort to restrict the supply of services in the market place" (*id.* at 38a). The court dismissed as well the contention that SCTLA's conduct was a "political boycott" under *NAACP* v. *Claiborne Hardware Co., supra*, affirming "the FTC's finding that the boycott was motivated primarily by economic self-interest" (Pet. App. 43a).

Although it rejected the claims of absolute First Amendment immunity for the lawyers' boycott, the court then concluded that "the SCTLA boycott did contain an element of expression warranting First Amendment protection" (Pet. App. 46a). It therefore applied the four-part test for evaluating restraints on "expressive conduct" in *United States* v. *O'Brien*, 391 U.S. 367 (1968), to determine whether application of the Sherman Act's *per se* prohibition of naked price-fixing agreements could be sustained in this case.

The court concluded that the Commission's action met the first three parts of the *O'Brien* test. Thus, the court acknowledged that the antitrust laws "lie within the constitutional power of Congress to regulate commerce"; that "the government's interest in prohibiting restraints on competition is 'important or substantial' "; and that enforcement of the antitrust laws is in no way " 'related to'

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naked horizontal restraints are illegal *per se* (Pet. App. 16a, 21a-22a). This Brief refers to "*per se*" illegality, "summary condemnation" and "condemnation without regard to market power" interchangeably to denote the circumstances in which the Sherman Act prohibits naked horizontal restraints of trade irrespective of whether market power (or actual detrimental competitive effects) can be proven.

the suppression of free expression" (Pet. App. 47a). The court held, however, that application of the *per se* rule failed the fourth *O'Brien* criterion, *i.e.*, that "the incidental restriction on alleged First Amendment freedoms [be] no greater than is essential to the furtherance of [the governmental] interest [served by the statute]" (*ibid.*). The court recognized that *per se* rules are a "legitimate and substantial aid in the administration of the antitrust laws" (*id.* at 50a), but held that this "evidentiary shortcut to antitrust condemnation without proof of market power is inappropriate as applied to a boycott that served, in part, to make a statement on a matter of public debate" (*ibid.*).

Finally, the court of appeals held that the present record does not establish that respondents enjoyed market power, even though the boycotters comprised nearly all the attorneys who made a practice of handling CJA cases and the boycott had "dramatically reduced the supply of lawyers to the city's CJA program' " and " 'adversely affected the city's ability to meet its constitutional obligation to provide counsel for indigent defendants' " (Pet. App. 53a-55a). The court observed that the Commission would most likely be required on remand to "examine structural evidence to determine the degree of market power, if any, that [respondents] wielded" (*id.* at 55a). The court further directed that the Commission must determine "how much market power is sufficient to justify the condemnation of an expressive boycott"—an inquiry that the court termed "a matter of first impression" (*id.* at 56a).[10]

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[10] Judge Silberman concurred in a separate opinion (Pet. App. 58a-61a). In his view, the lawfulness of respondents' boycott turned not on whether it was driven by commercial or political motives, but on whether, in light of the techniques used by the participants, the boycott succeeded through political pressure, rather than through economic coercion. He concluded that if, on remand, it is established that respondents enjoyed no market power, then "the boycott must

INTRODUCTION AND SUMMARY OF ARGUMENT

In their own words, the SCTLA lawyers "agree[d] that unless we are granted a substantial increase in our hourly rate we will cease accepting new appointments under the Criminal Justice Act" (Pet. App. 8a). When the City did not increase the hourly rate, the lawyers implemented their agreement and collectively withheld their services until offered a higher price for them. As the court of appeals' opinion demonstrates (*id.* at 14a-22a), the lawyers' conduct was "the essence of 'price-fixing'," and "a classic restraint of trade within the meaning of Section 1 of the Sherman Act" (*id.* at 16a).[11]

Naked horizontal price-fixing agreements are unlawful *per se*, without regard to whether the conspirators can be proven to have market power (Pet. App. 20a). This Court "ha[s] not wavered in [its] enforcement of the *per se* rule against price-fixing" (*Arizona* v. *Maricopa County Med-*

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have succeeded out of persuasion and been a political activity" (*id.* at 60a).

[11] SCTLA has at various times sought to distinguish its conduct from price-fixing by contending that the City Council, rather than the CJA lawyers, set the price for CJA services. In fact, the City Council, like any buyer, merely established the price it would *offer* for CJA services. Lawyers were not obligated to work at that price and many lawyers declined to do so (though, except when they boycotted, never in such numbers that the City was left unable to supply counsel to the indigent accused). The law prohibits agreement by sellers on the price at which they will offer to sell. Where, as in the market for indigent legal services (and as in many other markets), the buyer posts a price and invites sellers to supply it at that price, price-fixing takes precisely the form it took here: the collective refusal by sellers to offer their services unless and until the buyer increases its posted price. See *e.g.*, Pet. App. 18a-19a; *San Juan Racing Ass'n* v. *Associacion de Jinetes*, 590 F.2d 31 (1st Cir. 1979) (enjoining, as unlawful price-fixing, concerted refusal to deal by race track jockeys at rate offered by state-owned track).

ical Society, 457 U.S. 332, 347 (1982)). It has "consistently and without deviation" held naked horizontal price-fixing agreements to be unlawful "contract[s] * * * in restraint of trade" (15 U.S.C. 1), whether or not the conspirators can be proven to have market power and no matter how reasonable one may consider the prices they fix to be (*United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 218, 221 (1940)).

"As a matter of law, the absence of proof of market power does not justify a naked restriction on price or output" (*FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447, 460 (1986), citing *NCAA* v. *Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 109 (1984)). This "oldest and clearest of antitrust doctrines" (R. Bork, *The Antitrust Paradox* 67 (1978)) provides valuable certainty to those who must obey the law and makes possible effective law enforcement (*Arizona* v. *Maricopa County Medical Society*, 457 U.S. at 344). And while "[*p*]*er se* rules always contain a degree of arbitrariness," the *per se* rule against naked horizontal price-fixing has uniformly been found "justified on the assumption that the gains from imposition of the rule will far outweigh the losses and that significant administrative advantages will result." *United States* v. *Container Corp.*, 393 U.S. 333, 341 (1969) (Marshall, J. dissenting); see also, *e.g.*, 3 P. Areeda & D. Turner, *Antitrust Law* ¶ 836, at 35i (1978); 7 P. Areeda, *Antitrust Law* ¶ 1509, at 408-413 (1986).

The court of appeals recognized these principles, but devised a novel and untenable exception to them. Its holding that there is no absolute immunity for price-fixing is correct, but its conclusion that special new antitrust rules should govern analysis of the price-fixing in this case should be reversed.

1. The court of appeals held correctly that nothing in the First Amendment, as construed by this Court, im-

munized SCTLA's price-fixing boycott entirely from antitrust scrutiny. The *Noerr* doctrine, by which this Court has balanced the speech and lobbying rights of competitors against the antitrust rights of the public, very clearly does not protect the conduct here. Under *Noerr*, competitors may lobby collectively to persuade the legislature to fix prices and restrict output, but may not collectively fix prices or restrict output themselves (as the SCTLA lawyers did) in order to induce the legislature to take action. Likewise inapplicable is *NAACP* v. *Claiborne Hardware Co.*, *supra*, which conferred First Amendment protection against a state tort law challenge on a "political boycott" by consumers seeking to vindicate basic rights of freedom and equality. *Claiborne Hardware* does not afford antitrust immunity to price-fixing boycotts by competitors who seek to promote their parochial economic interests by arguing that those interests coincide with the public good.

2. Although the court of appeals correctly recognized that the First Amendment does not entirely immunize the conduct here from antitrust scrutiny, it erred in holding that an otherwise *per se* unlawful price-fixing boycott that is used to further a public lobbying campaign could—under the *O'Brien* test—be condemned only upon a showing that the participants had market power. As a threshold matter, there is serious doubt whether *O'Brien* applies at all. The *per se* rule prohibited respondents' boycott—their concerted refusal to deal—and not their speech, their lobbying, or their press relations. This Court's *Noerr* and *Claiborne Hardware* decisions make ample accommodation for First Amendment expression, and there is no warrant for superimposing the *O'Brien* test on those carefully confined doctrines.

But even assuming that *O'Brien* applies, the traditional *per se* rule easily meets its standards: the rule is within the constitutional power of the Government; it furthers an

important or substantial governmental interest unrelated to the suppression of free expression; and it incidentally restricts alleged First Amendment freedoms no more than is essential to further that underlying interest. In concluding that the Sherman Act failed the latter requirement, the court of appeals failed to accord the governmental interest in *efficacious* law enforcement the weight required by *O'Brien* itself and by this Court's decisions construing *O'Brien*. The court likewise failed to consider the implications of its holding for the ability of government and other antitrust plaintiffs to enforce the antitrust laws against all those who might seek the same special treatment accorded the lawyers here.

3. The court of appeals compounded its error by imposing upon those seeking to challenge "expressive price-fixing" a new and inordinately complex standard of market power proof. Even in evaluating alleged antitrust law violations to which *per se* treatment is not applicable, proof of market power is required only where proof is lacking that a restraint has caused actual detrimental effects. The purpose of proving market power is to help the court predict whether challenged conduct (such as a corporate acquisition) has the capacity, and is likely, to cause adverse competitive effects. In this case, however, the factfinder concluded, and the court of appeals did not dispute, that the boycotting lawyers fully realized their expectation that refusing to accept new cases would severely impede the District's capacity to provide indigent counsel. The court of appeals has offered no persuasive explanation why this evidence, as in all other cases, should not satisfy any showing of market power that might be required.

ARGUMENT

I. THE USE OF PRICE-FIXING TO LOBBY IS NOT IMMUNE FROM ANTITRUST LIABILITY UNDER THE FIRST AMENDMENT

The court of appeals unanimously agreed, as had the ALJ and the unanimous Commission before it, that nothing in the First Amendment entirely immunized the SCTLA lawyers' boycott from antitrust scrutiny. The court's holding on this point (Pet. App. 32a-45a) was correct and should be affirmed.

A. The *Noerr* Doctrine Does Not Shield the SCTLA Boycott from Scrutiny Under the Antitrust Laws.

Over the past three decades this Court has developed a body of case law—the *Noerr* doctrine[12]—to assure that the broad prohibitions of the Sherman Act do not infringe the First Amendment rights of competitors to petition their government. Application of that doctrine to the facts of this case is clear: competitors may jointly lobby the legislature to fix prices or restrict output (as the SCTLA lawyers did in early 1983), but competitors may not themselves fix prices or restrict output in an effort to induce the legislature to take favorable action (as the SCTLA lawyers did when they collectively refused to accept new cases "unless we are granted a substantial increase in our hourly rate").

In *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), this Court held that a concerted effort by railroads to persuade the Pennsylvania legislature to enact legislation detrimental to the trucking industry could not be a Sherman Act violation even though (1) the purpose of the railroads in seeking the

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[12] *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). See also *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965).

legislation was to injure competition; (2) the effect of the legislation would be to injure competition; and (3) some direct injury to competition might occur as an incidental result of the publicity campaign used by the railroads to communicate their views. Noting that "the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint" (365 U.S. at 136), the Court observed that (*id.* at 135-137):

> [a]lthough such associations could perhaps, through a process of expansive construction, be brought within the general proscription of 'combination[s] * * * in restraint of trade,' they bear very little if any resemblance to the combinations normally held violative of the Sherman Act, combinations ordinarily characterized by an express or implied agreement or understanding that the participants will jointly give up their trade freedom or help one another to take away the trade freedom of others through the use of such devices as price-fixing agreements, boycotts, market-division agreements, and other similar arrangements. This essential dissimilarity between an agreement jointly to seek legislation or law enforcement and the agreements traditionally condemned by § 1 of the Act, even if not itself conclusive on the question of the applicability of the Act, does constitute a warning against treating the defendants' conduct as though it amounted to a common-law trade restraint.

This Court in *Noerr* thus viewed the issue before it to be whether, in light of the First Amendment right to petition, "an expansive construction" (365 U.S. at 136) or an "extension of the Sherman Act" (*id.* at 141) should be allowed that would condemn anticompetitively motivated "agreement[s] jointly to seek legislation or law enforcement"

(*id.* at 136). The defendants in *Noerr* made no attempt to suggest that "combinations normally held violative of the Sherman Act," such as price-fixing or joint restrictions of output, could be made legal merely because they were used as a means of garnering publicity for a cause or otherwise pressuring the legislature. And this Court clearly assumed that, by its disposition of the case, it was not suddenly making such combinations legal after more than 60 years of *per se* condemnation under the Sherman Act.

The *Noerr* doctrine simply does not shield unreasonable restraints of trade that are wholly independent of any restraint *resulting from* the governmental activity sought by the defendant. In this respect it follows the common sense proposition that there is no "constitutional right in picketers to take advantage of speech or press to violate valid laws designed to protect important interests of society" (*Giboney* v. *Empire Storage Co.*, 336 U.S. 490, 501 (1949)). Just as no one would suggest that the SCTLA lawyers might lawfully have obstructed access to various councilmembers' offices unless those legislators agreed to speak to them or vote for their demands, so too, *Noerr* does not authorize the lawyers to engage in conduct that otherwise violates the Sherman Act to achieve the same result.

That *Noerr* does not immunize private price-fixing was reiterated by this Court only last year in *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, No. 87-157 (June 13, 1988). In that case the respondent, a manufacturer of plastic conduit, brought an action under the Sherman Act, alleging that petitioner, a leading producer of steel conduit, had unreasonably restrained trade in the electrical conduit market. Respondent contended that petitioners had conspired with others to exclude respondent's product from a code of industry standards, thereby causing respondent considerable commercial damage. Petitioner

defended its conduct under *Noerr*, claiming that its efforts to exclude plastic conduit from the code were intended to affect governmental legislation. This Court rejected that defense, holding that the *Noerr* doctrine does not "immunize[] every concerted effort that is genuinely intended to influence governmental action" (slip op. 9). In language strikingly appropriate to the present case, the Court explained (*id.* at 9-10):

> If all such conduct were immunized then, for example, competitors would be free to enter into horizontal price-agreements as long as they wished to propose that price as an appropriate level for government ratemaking * * *. Horizontal conspiracies or boycotts designed to exact higher prices or other economic advantages from the government would be immunized on the ground that they are genuinely intended to influence the government to agree to the conspirators' terms. * * * Firms could claim immunity for boycotts or horizontal output restrictions on the ground that they are intended to dramatize the plight of their industry and spur legislative action.

The SCTLA lawyers here took the very action that this Court cautioned against in *Allied Tube*: they declared a "boycott[] or horizontal output restriction[] * * * intended to dramatize the plight of their industry and spur legislative action" (slip op. 10). The court of appeals correctly held that *Noerr* offers no immunity for such activity.

B. The *Claiborne Hardware* Decision Does Not Shield the SCTLA Boycott From Scrutiny Under the Antitrust Laws

Noerr's clear dividing line between competitors who lobby the legislature to fix prices, and competitors who fix prices themselves in order to induce the legislature to take

action, has not been altered by *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982). In that case black consumers refused to deal with white merchants in order to induce government and business leaders to comply with a list of demands for equality and racial justice. The Court held that such a boycott was entitled to First Amendment protection against a state tort law challenge. The Court explained that while the government has "broad power to regulate economic activity," it does not have the right to "prohibit peaceful political activity such as that found in the boycott in this case" (*id.* at 913). The Court emphasized that the purpose of the boycott was not to destroy legitimate competition" but rather "to vindicate rights of equality and of freedom that lie at the heart of the Fourteenth Amendment itself" (*id.* at 914).

This Court has consistently rejected efforts, such as that made by SCTLA here, to extrapolate *Claiborne Hardware*'s "political boycott" doctrine to boycotts by economic competitors seeking an economic benefit for themselves.[13] In *Claiborne Hardware* itself, the Court cited, by way of defining the limitations on its holding, the Fifth Circuit's characterization of the same boycott rendered in a related case (458 U.S. at 915, citing *Henry* v. *First National Bank of Clarksdale*, 595 F.2d 291, 303 (5th Cir. 1979)):

> There is no suggestion that * * * defendants were in competition with the white businesses or that the boycott arose from parochial economic interests. On the

[13] Indeed, the Court has even declined to extend First Amendment protection to a secondary boycott by labor union members whose *only* purpose in conducting the boycott was political—to protest Soviet foreign and military policies. See *International Longshoremen's Assoc.* v. *Allied International, Inc.*, 456 U.S. 212 (1982).

> contrary, the boycott grew out of a racial dispute with the white merchants and city government of Port Gibson and all of the picketing, speeches, and other communication associated with the boycott were directed to the elimination of racial discrimination in the town. This differentiates this case from a boycott organized for economic ends, for speech to protest racial discrimination is essential political speech lying at the core of the First Amendment.

In *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, *supra*, the Court reiterated that *Claiborne Hardware* is limited to cases that do not involve economic competitors seeking self-serving economic benefits. As the Court observed in *Allied Tube*, the boycott in *Claiborne Hardware* "was not motivated by any desire to lessen competition or to reap economic benefits but by the aim of vindicating rights of equality and freedom lying at the heart of the Constitution" and "the boycotters were consumers who did not stand to profit financially from a lessening of competition in the boycotted market" (slip op. 14-15). The Court contrasted those facts with the situation in *Allied Tube* itself, in which "petitioner was at least partially motivated by the desire to lessen competition, and, because of petitioner's line of business, stood to reap substantial economic benefits from making it difficult for respondent to compete" (*ibid.*).[14]

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[14] The cited language disposes of the suggestion made by SCTLA in proceedings below that there is significance to the fact that the *Claiborne Hardware* boycotters, by eliminating racial discrimination against themselves, sought personal economic benefits through increased employment opportunities. Obviously, the elimination of discrimination can be of ultimate economic advantage in many ways to the former victims of that discrimination. *Allied Tube* makes clear, however, that boycotts potentially yielding such a benefit are not analogous to agreements by which economic competitors merely seek

It is apparent, moreover, as the court of appeals observed, that expanding the limits of *Claiborne Hardware* in the manner urged by SCTLA would lead to "economic chaos" (Pet. App. 45a). Before the lower court, SCTLA maintained that immunity should be conferred upon all competitor boycotts " 'designed to dramatize public issues' " (*ibid.*) or "mobilize the political pressure necessary to enact * * * a statute" (86-1465 Pet. Br. at 32). This approach would legalize numerous price-fixing boycotts both against governments, (as the court of appeals recognized (Pet. App. 45a, 28a)), and against private parties as well.[15]

The SCTLA lawyers are hardly unique in believing that their work serves a purpose greater than providing them with a source of income. As the court of appeals recognized, "[n]o doubt most business people who sell to the government are of the opinion that they could better serve the public if only the price of their goods or services were increased" (Pet. App. 28a). And no doubt, too, the more than 20% of the gross national product that legislatures appropriate for various goods and services (*id.* at 45a & n.31) implicates innumerable "public issues" and matters of "public importance," as to which various interest groups might wish to communicate and publicize their views. Manifestly, however, vital antitrust protections would be intolerably eroded if concerted price-related refusals to deal by competitors are permitted in circumstances such as those in this case.[16]

"to profit financially from a lessening of competition in the boycotted market" (slip op. 15).

[15] *Claiborne Hardware* itself involved a boycott against private businesses. If its holding is extended to protect competitor boycotts, there is no logical reason why that extension should apply only to boycotts directed against governments.

[16] Both the court of appeals and the Commission found that the SCTLA boycott "was motivated primarily by economic self-interest"

In its cross-petition for certiorari, SCTLA has apparently sought to narrow the untenably broad positions it advanced before the Commission and the court of appeals, arguing now (88-1393 Pet. 7) that its boycott should receive First Amendment protection because the lawyers were acting as "surrogates" for persons "who could not or would not act for themselves." However, many businessmen can and do claim to be surrogates for persons who will benefit from, but are not well able to affect the quality of, the goods and services those businessmen purvey. Physicians who treat indigents under Medicaid programs are as much "surrogates" for their patients when they seek an increase in state Medicaid payments as the SCTLA lawyers were "surrogates" for their indigent clients. Engineers who collectively refuse to engage in competitive bidding on major public construction projects may claim that they are "surrogates" for the motoring public that uses bridges and roads but is in no position to decide

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(Pet. App. 43a). This finding is abundantly supported by a record showing that the dominant focus of the boycott was a rate increase for the lawyers, as opposed to numerous other measures arguably more relevant to the welfare of indigent clients (such as an increase in the number of compensable hours that a lawyer might spend on a single case) (*ibid.*). Although overwhelming evidence of the lawyers' parochial economic motivation makes this case a simple one, we agree with Judge Silberman's concurrence (id. at 58a-60a) insofar as it suggests that application of *Claiborne Hardware* should not turn on the subjective motivation of a particular group of price-fixing competitors. In practice, virtually *every* public price-fixing boycott directed against the government will involve mixed motives – competitors who want a price increase and also believe the public will benefit by spending more on their services. The dicta in *Claiborne Hardware* and *Allied Tube* cited above establish – and this Court should so hold – that price-fixing by competitors, whatever the precise (but unfathomable) ratio of avarice to idealism that motivates it, is simply not constitutionally protected conduct.

upon (or implement) the steps needed to maintain safe highways (see *National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978)). Each of these groups, and many others as well, may make a "surrogacy" claim every bit as earnestly as respondents do. None, however, falls within *Claiborne Hardware*.

SCTLA's other proposed effort to distinguish its conduct—that by increasing the billing rates of lawyers, its boycott was designed to vindicate its clients' Sixth Amendment right to effective assistance of counsel (88-1393 Pet. 7)—is also insupportable. For one thing, as the court of appeals expressly noted, citing the Commission (Pet. App. 30a):

> Counsel for the petitioners [SCTLA] acknowledged at oral argument before the Commission that the pre-boycott level of services was adequate to secure the Sixth Amendment rights of their clients.[17]

The court of appeals nevertheless allowed both SCTLA and its amici to make arguments regarding the adequacy of pre-boycott representation that SCTLA had expressly disavowed before the Commission (Pet. App. 29a-32a). And in reliance on these arguments, the court of appeals declined to accept the Commission's affirmative finding that the pre-boycott level of representation was adequate (*id.* at 30a n.21).[18] In the end, however, the court recog-

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[17] Before the Commission, SCTLA characterized the debate as one over the level of subsidized representation appropriate for indigent defendants (Pet. App. 114a):

> There [was] a Chevrolet[] sort of quality * * * service being provided. There were some people who thought we really ought to have an Oldsmobile quality service.

[18] The Commission had based its finding in part upon the fact that reversals of criminal convictions for ineffective assistance of counsel were "exceedingly rare" and in part upon SCTLA's representation to it that pre-boycott assistance was generally adequate (Pet. App. 112a).

nized (as had the Commission and ALJ (*id.* at 165a)), that there was no record basis from which one might conclude that pre-boycott rates had resulted in significant Sixth Amendment violations, and it explained how such a showing might have been made had SCTLA intended to do so (*id.* at 31a). As the court then concluded (*id.* at 31a-32a), the SCLTA lawyers

> have simply not pursued the argument, and their occasional references to the constitutional underpinnings of their boycott are but so much parsley to garnish the arguments they have made. Thus, we decide this case as it comes to us, upon a record that does not support, and by petitioners who do not seek a finding that the preboycott rates resulted in systematic violations of the Sixth Amendment.

Even if vindication of Sixth Amendment rights were a defense to price-fixing, the "one seeking relief bears the burden of demonstrating that he is entitled to it" (*Clark* v. *Community for Creative Non-Violence,* 468 U.S. 288, 293 n.5 (1984)). Having represented to the Commission that the public issue in their boycott was the proper level of funding for indigent legal services, rather than the constitutional adequacy of those services, SCTLA (and its amici) should not be heard to argue the opposite before this Court (see *United States* v. *L.A. Tucker Truck Lines,* 344 U.S. 33, 37 (1952)).

Finally, even if the record did show (which it does not) that the difference between the pre-boycott CJA rates and the post-boycott rates made the difference between receipt and denial of Sixth Amendment rights by indigents, and even if the record did show (which it does not) that the CJA lawyers' concern for the rights of their clients was the paramount motive for their price-fix, this still would not warrant constitutional protection for a price-fixing

boycott by competitors. "That a particular practice may be unlawful is not, in itself, a sufficient justification for collusion among competitors to prevent it" (*FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. at 465; see also *Fashion Originators' Guild, Inc.* v. *FTC*, 312 U.S. 457, 467-468 (1941)).

There is no more reason to permit vigila .e price-fixing than to permit any other form of unlawful action undertaken by those purporting to further some higher purpose. And there is no apparent reason why the antitrust obligations (or the First Amendment rights) of competitors should turn on whether they offer a service that the government is expressly required to provide by the Bill of Rights (such as indigent legal services or habitable jails) or whether they merely offer services needed by the government to "provide for the common defence" or "promote the general Welfare" (Preamble, United States Constitution). If CJA lawyers did have a constitutional right collectively to withhold their services from the government "unless we are granted a substantial increase in our hourly rate," the same novel right could not, in any principled way, be denied a great many others.[19] As the court below recognized, that is a strong reason why no such right should be created.

II. THE COURT OF APPEALS INCORRECTLY HELD THAT, AS APPLIED TO THIS CASE, THE SHERMAN ACT'S *PER SE* PROHIBITION OF NAKED HORIZONTAL PRICE-FIXING AGREEMENTS CONTRAVENES THE FIRST AMENDMENT

As noted above, the court of appeals correctly recognized that the SCTLA boycott fell on the wrong side of the

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[19] Before the court of appeals, at least, SCTLA seemed to recognize this fact, maintaining that the legality of its boycott should not turn

line that this Court drew in *Noerr* between the First Amendment rights of competitors and their antitrust responsibilities to the public, and was likewise not a protected "political boycott" within the meaning of *Claiborne Hardware*. In a striking reversal of course, however, the court then considered whether SCTLA's conduct was protected if labeled an "expressive boycott" rather than "lobbying," and if judged by the standards of *O'Brien* rather than *Noerr*. Here the court erred in concluding that such an approach warranted any difference in treatment.

1. At the outset, we think it is doubtful whether the *O'Brien* test applies at all to the SCTLA boycott. In *O'Brien*, the Court upheld a defendant's conviction for wilfully destroying his draft card. The Court assumed, without deciding, that the "alleged communicative element" in defendant's conduct was "sufficient to bring into play the First Amendment" (391 U.S. 376), but it rejected the claim on the merits. The Court articulated a four-part test for assessing the constitutionality of a regulation that affects expressive conduct. Such a regulation, the Court explained, may be justified (*id.* at 377):

> [1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

But while the Court in *O'Brien* recognized that some nonverbal activity may deserve First Amendment protec-

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upon whether its members sought to vindicate the constitutional rights of their clients or sought merely to improve the quality of legal care they received (86-1465 Pet. Br. at 36-37).

tion as "symbolic speech," it firmly rejected the notion that "an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea" (*O'Brien*, 391 U.S. at 376). See also *Texas* v. *Johnson*, No. 88-155 (June 21, 1989), slip op. 6; *Spence* v. *Washington*, 418 U.S. 405, 409 (1974); *Cohen* v. *California*, 403 U.S. 15, 18 (1971). Wherever the line between protected and unprotected activity is ultimately drawn, it seems apparent—if the Court's statement in *O'Brien* is to be meaningful at all—that respondents' price-fixing boycott should not trigger the four-part inquiry mandated by that decision.

The application of *O'Brien* in this context is fundamentally inconsistent with the delicate balance, articulated by this Court, between First Amendment principles and the commands of the Sherman Act. On the one hand, the *Noerr* doctrine and *Clairborne Hardware* give substantial protection to "expressive" activity that might otherwise fall within the broad language of the antitrust laws. At the same time, the Court has carefully confined those cases to their proper sphere, recognizing that "[t]he First Amendment does not 'make it . . . impossible ever to enforce laws against agreements in restraint of trade' " (*Professional Engineers*, 435 U.S. at 697 (citation omitted)). By superimposing the *O'Brien* standard on the Court's existing doctrines, the court of appeals' decision upsets that accommodation.[20]

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[20] Even acts of pure speech that are "an essential and inseparable part" (*Giboney* v. *Empire Storage Co.*, 336 U.S. 490, 502 (1949)) of an antitrust violation lack constitutional protection. In *Professional Engineers*, for example, a district court found that the Society, an organization of professional engineers, had violated the Sherman Act by agreeing to refrain from competitive bidding. The district court ac-

Moreover, to the extent that the SCTLA boycott is plausibly analogized to a "strike" it does not, for that reason, secure any special protection under the First Amendment. "The right to strike," this Court has observed, is "vulnerable to regulation" (*International Union, UAW* v. *Wisconsin Employment Relations Bd.*, 336 U.S. 245, 259 (1949)). Consistent with that fact, Congress has, at different times, both expanded (see, *e.g.*, Norris-LaGuardia Act, 29 U.S.C. 104; *Order of R.R. Tel.* v. *Chicago & N.W. Ry.*, 362 U.S. 330 (1960)), and contracted (see, *e.g.*, Railway Labor Act, 45 U.S.C. 151-188; *Brotherhood of R.R. Trainmen* v. *Chicago R. & I.R.R.*, 353 U.S. 30 (1957); and Section 301(a) of the Labor-Management Relations Act, 1947, 29 U.S.C. 185(a); *Boys Mkts., Inc.*, v. *Retail Clerks Union, Local 770*, 398 U.S. 235 (1970)), the right to strike. See also *Dorchy* v. *Kansas*, 272 U.S. 306, 311 (1926). Indeed, strikes by public employees are usually subject to strict regulation, free from First Amendment scrutiny. See 5 U.S.C. 7311(3) (no right to strike against the United States or District of Columbia government); 18 U.S.C. 1918 (criminal penalty for violation of 5 U.S.C. 7311).[21]

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cordingly enjoined the organization from adopting any policy statement that stated or implied that competitive bidding was unethical. This Court rejected the Society's contention that such an injunction abridged its First Amendment rights. "Having found the Society guilty of a violation of the Sherman Act," the Court explained, "the District Court was empowered to fashion appropriate restraints on the Society's future activities both to avoid a recurrence of the violation and to eliminate its consequences" (435 U.S. at 697). The Court stated that "[w]hile the resulting order may curtail the exercise of liberties that the Society might otherwise enjoy, that is a necessary and, in cases such as this, unavoidable consequence of the violation" (*ibid.*).

[21] In fact, this Court has held that even a work-stoppage with overtly and exclusively political content falls outside the protections of the First Amendment. In *International Longshoremen's Assoc.* v. *Allied*

It should also not matter that the boycotters "actively courted media coverage of their 'strike' " or that "[t]he media responded with a number of newspaper articles and television stories" (Pet. App. 47a). Respondents were not charged with successful public relations; they were charged with a concerted refusal to deal at prevailing prices. It cannot be that a price-fixer secures the First Amendment protection offered by *O'Brien* simply by garnering favorable publicity.

2. Even if *O'Brien* were properly applied to the facts of this case, however, the *per se* rule against naked horizontal price-fixing satisfies its standards. The court of appeals here recognized that the Sherman Act, including its categorical prohibition of naked horizontal price-fixing without regard to market power, easily met the first three prongs of the *O'Brien* test (Pet. App. 47a). The Sherman Act lies clearly within the constitutional power of Congress, the interest it serves is in no way directed to the suppression of expression, and the interest it promotes is important and substantial. As this Court has repeatedly observed:

> Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free enterprise system as the

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International, Inc., 456 U.S. 212 (1982), the Court unanimously held that a union's refusal to unload cargoes shipped from the Soviet Union, in order to protest the Russian invasion of Afghanistan, constituted an illegal secondary boycott under the National Labor Relations Act, 29 U.S.C. 158(b)(4). The Court explained that it had "consistently rejected the claim that secondary picketing by labor unions * * * is protected activity under the First Amendment" (456 U.S. at 226). And the court added that "[i]t would seem even clearer that conduct designed not to communicate but to coerce merits still less consideration under the First Amendment" (*ibid.*).

> Bill of Rights is to the protection of our fundamental personal freedoms.[22]

In concluding that the Sherman Act's prohibition of price-fixing failed the fourth *O'Brien* criterion, the court of appeals reasoned that the underlying "policies of the antitrust laws" (Pet. App. 48a) (to prevent and eradicate trade restraints that harm competition) could still be achieved if proof of market power were required to determine the legality of every "expressive" price-fixing boycott. The court dismissed the *per se* ban on naked price-fixing as serving "only" (*id.* at 49a) to promote administrative convenience and efficiency in achieving the substantive purpose of the Sherman Act, and held (implicitly) that this governmental interest was so insubstantial that it must yield in the face of a party's desire to use a "*per se* violation of the Sherman Act" to further a lobbying campaign. We disagree.

a. Even if the court of appeals properly characterized the Sherman Act's blanket prohibition on naked horizontal price-fixing as "only" an administrative aid, invalidation of the *per se* rule in this case runs squarely afoul of *O'Brien* itself. *O'Brien* sustained a *per se* requirement that all draft-eligible men possess a draft card, notwithstanding that this requirement was but an "administrative aid" that helped to assure the "smooth and efficient function[]" of the draft (391 U.S. at 382).

That *O'Brien*'s telling result did not turn, as the court of appeals speculated, on the fact that it involved "Congress's effort to raise and maintain an army during a period of international conflict" (Pet. App. 50a), is clear from *United*

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[22] *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 110-11 (1980), citing *United States* v. *Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972); see also *Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 398 n.16 (1978).

States v. *Albertini*, 472 U.S. 675 (1985). *Albertini* involved a peacetime challenge to an administrative bar order applied to exclude a former serviceman from a military base "open house." Application of the bar order denied Albertini an opportunity to express his views at the open house as other members of the public were allowed to do. Enforcement of the order was "not 'essential' in any absolute sense to security at the military base," for the government could have fashioned a "less restrictive" means of protecting its interests—such as by "provid[ing] [respondent] with a military police chaperone during the open house" (*id.* at 688). Nonetheless, this Court held that "[t]he First Amendment does not bar application of a neutral regulation that incidentally burdens speech merely because a party contends that allowing an exception in the particular case will not threaten important government interests. * * * Nor are such regulations invalid simply because there is some imaginable alternative that might be less burdensome on speech" (*id.* at 688-689). Rather, the Court explained, "an incidental burden on speech is no greater than is essential, and therefore is permissible under *O'Brien*, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation" (*id.* at 689). Applying that standard, the Court upheld the bar order under *O'Brien*.

This Court's holding in *Albertini*, with which no Justice disagreed,[23] contrasts sharply with the sentiment ex-

[23] Three Justices dissented from the majority's conclusion that the statutory prohibition covered the conduct in question, but there was no dispute with the majority's articulation of the proper test to be applied in determining whether the First Amendment, as construed in *United States* v. *O'Brien*, forbids application of a statute to conduct undertaken for the purpose of expressing a point of view. See 472 U.S. at 691-702.

pressed by the court of appeals' statement that "we do not say that administrative convenience may never justify an incidental restriction on expressive conduct" (Pet. App. 50a). *Albertini* leaves no room to doubt that efficacy in achieving important governmental purposes is itself a substantial governmental interest that courts are not free to disregard.[24]

b. The court of appeals' interpretation of *O'Brien* also disregards this Court's admonition that the validity of a law attacked under *O'Brien* should not be judged "solely by reference to the demonstration at hand." Rather, one must consider the outcome if, "absent the [challenged] prohibition," others were to claim the favored constitutional treatment sought by the group before the court. *Clark* v. *Community for Creative Non-Violence*, 468 U.S. at 296-297;[25] accord, *United States* v. *Albertini*, 472 U.S. at 688-89; see also *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 654 (1981). Such consideration in this case demonstrates that the impact on antitrust enforcement of giving special treatment to the SCLTA lawyers would, in fact, be very broad.

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[24] The court of appeals itself recognized that the *per se* rule against price-fixing is an important administrative aid in enforcing the Sherman Act, serving goals of " '[b]usiness certainty and litigation efficiency' " (Pet. App. 19a-22a, citing *Arizona* v. *Maricopa County Medical Society*, 457 U.S. at 344). Although any required showing of market power would necessarily disserve these important interests, the damage done by the court of appeals' holding is compounded by its peculiarly complex definition of market power, discussed in Part III, *infra*.

[25] In *Community for Creative Non-Violence*, the Court denied First Amendment protection under *O'Brien* to homeless persons who, in order to facilitate an expressive demonstration, violated Park Service regulations that forbade camping in Lafayette Park.

The court of appeals purported to limit its holding to the "peculiar facts of this case" (Pet. App. 56a), but the court identified no facts that would permit such a limitation. In effect, the court's opinion accords favored treatment to any price-fixing boycott in which (1) competitors first make "active efforts to appeal to the public for support of their demand"[26] (2) against a governmental target[27] and (3) style their subsequent boycott as a continuation of this effort (*id.* at 50a-51a). Although the parameters of the court's decision are unclear, it may be invoked by the parties to a multitude of actual or threatened price-fixing boycotts that are conducted in public (or easily could be) and that begin with an entirely lawful public effort by conspirators to persuade the government to confer (in the name of the "public interest") whatever benefit they seek.

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[26] The court of appeals also suggested that the issue involved must be a matter of "public debate" (Pet. App. 50a), but nowhere defined that term or identified any First Amendment principle that would allow courts to accord greater rights to lawyers advocating increased public spending on legal care than to any other suppliers urging more government spending for their good or service. A "public debate" test thus does not narrow the "appeal to the public" criterion. We have explained earlier (Part I, *supra*), why a "public debate on constitutional issues" test is also untenable, either to describe the facts of this case, or as a basis for legalizing "expressive price-fixing."

[27] Although the court limits its holding to price-fixing against governmental targets, the logic of that result might not strike future courts or litigants as so confining. The court recognized that the *Noerr* doctrine, which applies to lobbying, did not apply here. Its conclusion that the SCTLA boycott deserved a "measure of First Amendment protection" was based, instead, upon the more general assertion that the boycott was used as a means of "expression." If such a right to fix prices to communicate (deriving from *O'Brien* rather than *Noerr*) were created, future litigants might well invoke it even in defense of "expressive price-fixing" directed at a private target.

A few examples from the Commission's own experience demonstrate the broader implications of the court of appeals' decision. In many states, a small fraction of all licensed physicians treats a large fraction of the indigent consumers who rely on state or federal payments for medical care. These physicians and their colleagues frequently combine to urge increases in Medicaid payments or the like, appealing to the public and invoking the welfare of their indigent patients as a reason to increase physicians' fees. When their lobbying fails, physicians sometimes go further, collectively refusing to provide medical care to indigent patients unless the applicable rates are raised. Fortunately, such concerted price-fixing boycotts, although often discussed, have thus far been infrequent—hardly surprising given that most people have considered them illegal *per se*.[28]

By abrogating *per se* treatment and requiring exhaustive proof of market power as well as the weighing of such power against the expressive goals of a Medicaid boycott (see part III, *infra*), the court of appeals' approach would vastly complicate administrative adjudication of the legality of such restraints. The court's decision would also make

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[28] There are always, however, the intrepid few (*e.g.*, *O'Halloran*, 5 Trade Reg. Rep. (CCH) ¶ 22,543 (FTC Aug. 26, 1988) (FTC consent agreement; alleged concerted refusal by five Rhode Island obstetricians to accept indigent cases absent Medicaid increase); *Thomas L. Looby, M.D., Lee M. Mabee, Jr., M.D.*, 5 Trade Reg. Rep. (CCH) ¶ 22,570 (FTC July 20, 1988) (consent agreement and complaint) (alleged collective withholding of services from state medical college; "expressive boycott" defense raised by party in litigation); *Chain Pharmacy Ass'n of New York, Inc.*, 5 Trade Reg. Rep. (CCH) ¶ 22,676 (FTC Apr. 26, 1989) (consent agreements and complaint) (alleged collective refusal by pharmacies to participate in state prescription payment plan); cf., *e.g.*, Raup, *Medicaid Boycotts by Health Care Providers: A Noerr Pennington Defense*, 69 Iowa L. Rev. 1393 (1984)).

it much harder for state or municipal targets of such boycotts to obtain preliminary injunctions against the participants, because plaintiffs would be obliged to show not merely concerted action and harmful effects, but convincing threshold evidence of market power as well.[29]

Another situation that is often threatened, but rarely occurs because the antitrust laws so clearly forbid it, is the concerted refusal by insurance companies to underwrite business in a jurisdiction that refuses to accord an economic benefit they have lobbied to obtain.[30] Although hundreds of insurance companies do business throughout the United States, often only a small number elect to underwrite certain forms of coverage in a particular locality, such as the District of Columbia. These companies frequently lobby jointly for various legislative benefits or against what they perceive as ill-founded legislative initiatives. Also frequently, insurance companies conduct their lobbying through appeals to the public (for example, by means of newspaper advertisements, explaining how the majority of policyholders would face higher premiums if legislation forbidding discrimination against certain individuals were not rejected). By arguing that a boycott of new business is a means of communicating their point of

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[29] Although the court was apparently moved to surmise that some District of Columbia officials encouraged the SCTLA boycott (Pet. App. 54a n.35), a sad irony of its holding is that if the D.C. government (or other state or local entity) wishes to resist the next such boycott, the antitrust laws might no longer help in that effort.

[30] The McCarran-Ferguson Act, 15 U.S.C. 1011-1015, exempts the "business of insurance" from federal antitrust regulation to the extent that it is regulated by state law, but nothing in that Act "shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation" (15 U.S.C. 1013(b)). See generally *St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U.S. 531 (1978).

view, insurers could presumably escape *per se* condemnation of their conduct as did the SCTLA lawyers in the court below.[31]

There is, in short, no way to confer the right of "expressive boycott" upon competing lawyers without also conferring it upon insurers, doctors, pharmacies, accountants, engineers, and a multitude of other competitors who seek every day to promote both their parochial economic interests and their vision of the public good in the public arena. That any holding protecting the SCTLA lawyers' conduct here from *per se* liability would necessarily extend far beyond the "demonstration at hand" is, as *Community for Creative Non-Violence* and *Albertini* teach, a reason why application of the *O'Brien* test to the conduct here does not protect it.

3 This case cannot be distinguished from *Albertini* and *Community for Creative Non-Violence* by the court of appeals' puzzling assertion that the Sherman Act's *per se* prohibition of naked horizontal restraints is "not a statutory command" (Pet. App. 49a).[32] The *per se* prohibition against naked horizontal price-fixing agreements is an important, well-established rule of substantive law

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[31] And given the difficulty of proving market power as defined by the court of appeals (see Part III, *infra*), dispensation from the *per se* rule might well encourage even such large corporations as insurance companies to engage in "expressive boycotts."

[32] To support this proposition, the court of appeals cited (Pet. App. 49a) the Commission's appellate brief (at 39) and this Court's decision in *Jefferson Parish Hospital Dist. No. 2* v. *Hyde*, 466 U.S. 2, 15-16 n.25 (1984). But those sources state only that the *per se* rule promotes goals of law enforcement convenience and efficiency. Many provisions of law are framed to promote efficiency and clarity in achieving some underlying substantive purpose of the legislature (*e.g.*, the requirement to possess a draft card sustained in *O'Brien* itself), a fact that has never been thought to diminish the obligation of citizens to obey, or courts to enforce, such provisions.

that deters antitrust violations and facilitates antitrust enforcement by identifying with precision conduct that is prohibited by the Sherman Act. Although the language of the Sherman Act itself is cast broadly (*e.g.*, "[e]very contract * * * in restraint of trade"),[33] and has required judicial elaboration, this Court has "not wavered" in construing the statutory language to forbid naked horizontal price-fixing without proof of market power. *Arizona* v. *Maricopa County Medical Society*, 457 U.S. at 347; *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. at 218, 221; R. Bork, *supra*, at 66-67. The language of a statute, as construed unvaryingly by this Court, is surely a "statutory command" that all persons must obey and that courts of appeals must enforce. See *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643 (1980) (reversing court of appeals for failure to apply *per se* rule to naked horizontal restraints).

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[33] Even in the face of a First Amendment challenge, the mere fact that a statute prohibits a broad range of conduct affords no reason for refusing enforcement. See, *e.g.*, *International Longshoremen's Assoc.* v. *Allied International, Inc.*, 456 U.S. at 225 (rejecting First Amendment challenge to statute prohibiting secondary boycotts that Congress had "purposefully drafted in broadest terms"). The court of appeals cited *In re Primus*, 436 U.S. 412, 434 (1978), for the proposition that " '[w]here political expression or association is at issue, this Court has not tolerated the degree of imprecision that often characterizes government regulation of the conduct of commercial affairs' " (Pet. App. 50a). But *Primus* involved (1) a direct regulation of speech (a ban on solicitation that the state sought to apply to a "letter to a woman with whom appellant had discussed the possibility of seeking redress for an allegedly unconstitutional sterilization") and (2) communication by a lawyer of "an offer of free assistance by attorneys associated with the ACLU * * * * to express personal political beliefs and to advance the civil-liberties objectives of the ACLU, rather than derive financial gain" (436 U.S. at 422). *NAACP* v. *Button*, 371 U.S. 415 (1963), also cited by the court (Pet. App. 49a), is similarly inapposite.

Nor may this case be distinguished from *Albertini* by the court of appeals' assertion that "[t]he antitrust laws permit, but do not require, the condemnation of price fixing without proof of market power" (Pet. App. 49a). This Court has repeatedly held that "[a]s a matter of law, the absence of proof of market power does not justify a naked restriction on price or output" (*NCAA* v. *Board of Regents of the Univ. of Okla.*, 468 U.S. at 109; see also, *FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. at 461-462; *Professional Engineers*, 435 U.S. at 692). Of course, the antitrust enforcement authorities have discretion to pursue only those price-fixing conspiracies in which they believe market power exists, just as a statutorily-mandated speed limit leaves a radar patrolman discretion to ticket only motorists caught driving dangerously in excess of the posted speed. However, this does not mean that a reviewing court may second-guess that prosecutorial judgement by requiring a formal demonstration of market power. The validity of the Commission's order "does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests" (*Albertini*, 472 U.S. at 689).[34]

The court of appeals' proposed suspension of the *per se* rule in this case also cannot be defended by pointing to other contexts in which the Court has revised the categories of trade restraints subject to *per se* condemnation. See, *e.g.*, *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977) (non-price vertical restraints

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[34] In fact, the FTC focuses its resources upon trade restraints in which it believes market power is likely to exist. In the present case, for example, it concluded that a price-fixing agreement involving nearly every D.C. lawyer who made a practice of representing indigent clients involved the exercise of market power. (See Part III, *infra*.)

judged by rule of reason), overruling *United States* v. *Arnold Schwinn & Co.*, 388 U.S. 365 (1967) (vertical territorial restraints *per se* unlawful). Plainly, courts construing the Sherman Act must take account of changed understandings about the competitive effects of certain kinds of restraints. But that does not authorize a lower court to depart from an established *per se* rule because, in its view, some other social good—wholly apart from the statutory purpose of preserving competition—may come of it. See *Professional Engineers*, 435 U.S. at 694-696. At bottom, that is what the court of appeals did in this case.

4. Finally, many areas of law besides antitrust would be adversely affected if the court of appeals' novel reading of *O'Brien* were substituted for this Court's holding in *Albertini*. A brief consideration of such consequences demonstrates why this Court's holding in *Albertini* is far preferable. Many statutes prohibit more than those instances of conduct that cause the substantive harm the legislature seeks to prevent. Such "overinclusiveness" helps make laws "more certain to the benefit of everyone concerned" (*Northern Pac. R. R.* v. *United States*, 356 U.S. 1, 5 (1958)), and thereby allows effective statutory enforcement. If courts may ignore the value of clarity and enforcement effectiveness, citing *O'Brien* to rewrite "overinclusive" laws whenever a party sincerely desires to enhance the appeal of a stalled lobbying campaign by engaging in unlawful conduct, the effects on society would be profound.

To cite the most obvious example, the many federal and state laws categorically prohibiting strikes by public employees or other selected groups, without regard to whether the strikers can be proven to possess market power or to have demonstrably harmed the public interest, could scarcely survive the lower court's reading of *O'Brien*

in this case.[15] Such laws, as construed, typically prohibit any "refusal in concert with others to provide services to one's employer" (*United Fed'n of Postal Clerks* v. *Blount*, 325 F. Supp. 879, 884 (D.D.C.) aff'd mem, 404 U.S. 802 (1971)), just as the Sherman Act categorically prohibits naked price-related refusals to deal by competing entrepreneurs. It could scarcely be contended that the laws against public employee strikes are unconstitutional because that they forbid such strikes *per se* without requiring a particularized showing of the strikers' capacity to inflict harm.

The court of appeals saw this case as one of "first impression" (Pet. App. 56a),[16] in which it was obliged to balance the First Amendment rights of competitors with the antitrust rights of the public. But this Court has already carefully struck that balance in the *Noerr* doctrine which, as the court of appeals recognized, does not protect

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[15] The court of appeals considered it a point strongly in SCTLA's favor that its boycott resembled a "strike" (Pet. App. 50a). But that analogy undermines SCTLA's position, because "there is no constitutional right to strike" (*United Fed'n of Postal Clerks* v. *Blount*, 325 F. Supp. 879, 883 (D.D.C.) (three-judge court), aff'd mem., 404 U.S. 802 (1971)). Any "right to strike" without antitrust consequences that does exist derives only from an express statutory exception to the antitrust laws (15 U.S.C. 17; 29 U.S.C. 52) and other statutory provisions (see p. 27, *supra*). SCTLA has never suggested—nor could it—that such provisions apply to it (Pet. App. 7a n.6).

[16] This is true only in the trivial sense that no court has previously addressed SCTLA's inventive claim that summary condemnation of price fixing is unconstitutional under *O'Brien*. Courts have routinely applied the Sherman Act to "speech" used to effect a restraint of trade. See, *e.g.*, *Professional Engineers*, 435 U.S. at 693-695, ("no elaborate * * * analysis" (and certainly none of market power) required to condemn "on its face" speech in the form of a code of ethics prohibiting engineers from bidding competitively to design "large-scale projects significantly affecting the public safety").

price-fixing boycotts. Just as solicitude for the wish of a former serviceman to express his views at a military base "open house" did not permit a court to suspend a bar order against him (*Albertini*), and solicitude for the wish of homeless people to protest their dire condition did not permit a court to suspend applicable Park Service regulations (*Community for Creative Non-Violence*), so too solicitude for the wish of a lawyers' trade association to advocate a rate increase for its members does not permit a court to suspend operation of the *per se* rule against price-fixing.

Because the Sherman Act's *per se* prohibition of naked price-fixing agreements "promotes a substantial governmental interest that would be achieved less effectively absent the regulation" (*Albertini*, 472 U.S. at 689), *United States* v. *O'Brien* does not require or permit alteration of that prohibition in this case.

III. THE COURT OF APPEALS ERRED BY REQUIRING FURTHER PROOF OF MARKET POWER DESPITE EVIDENCE OF THE BOYCOTT'S ACTUAL DETRIMENTAL EFFECTS ON COMPETITION

The court of appeals' error respecting application of the *per se* rule against public price-fixing boycotts is compounded by its additional holding that, in such cases, the government must prove market power even where the boycott has led to demonstrated anticompetitive effects. The court's ruling on this point contravenes decisions of this Court and would create extensive confusion among businesspersons and antitrust enforcers alike in attempting to fathom when price-fixing agreements are lawful and when they are not.

Where evidence regarding market power is properly required in an antitrust case, its purpose is to enable the court to determine whether a challenged restraint is actually likely to cause anticompetitive effects, *i.e.*, increased

prices or decreased output (*e.g.*, *NCAA* v. *Board of Regents of the Univ. of Okla.*, 468 U.S. at 110-111 n.42). Thus, as this Court has recently reiterated, even where market power is arguably an element of the antitrust offense, " 'proof of actual detrimental effects, such as a reduction of output' can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects' " (*FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447, 460-461 (1986) (citing 7 P. Areeda, *Antitrust Law* ¶ 1511, at 429 (1986)).

The Commission applied this Court's teaching in holding that, in addition to being *per se* illegal, the SCTLA boycott was unlawful under a rule of reason analysis. The Commission found that the boycott, joined by nearly 100% of all CJA "regulars" (those who made a practice of representing indigent defendants under the CJA), had "dramatically reduced the supply of lawyers to the city's CJA program," had "adversely affected the city's ability to meet its constitutional obligation to provide counsel for indigent defendants," and had "forced the city government to increase the CJA fees from a level that had been sufficient to obtain an adequate supply of CJA lawyers to a level satisfactory to the [lawyers]" (Pet. App. 96a). The Commission also found "a direct causal link between the [lawyers'] coercive boycott and the city government's capitulation to their demands" (*id.* at 97a), noting that the City had increased CJA rates only after the boycott had occurred, and only because it had resulted in an imminent "crisis" in the courts.[17]

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[17] The Commission also affirmed the conclusion of the ALJ "that the [SCTLA lawyers] had market power, *i.e.*, the ability to raise price above the competitive level, *NCAA* v. *Board of Regents*, 468 U.S. at 109)" (Pet. App. 92a n.79). The ALJ based his conclusion on findings that "[SCTLA's] argument that the CJA lawyers lacked the power to

Notwithstanding these findings, the court of appeals hypothesized that because the CJA lawyers' price-fixing boycott was designed to "communicate," the boycott's adverse effects could have resulted from "political" rather than "economic" power (Pet. App. 53a-55a). In the court's view, it was conceivable that "lacking any market power, [SCTLA] procured a rate increase by changing public attitudes through the publicity attending the boycott"[38] and that the reduced supply of lawyers to city courts that attended the boycott merely "reflect[ed] the success of SCTLA's persuasive campaign among other lawyers who were in the same market but were also in political sympathy with [SCTLA]" (*id.* at 53a-55a).

The court of appeals' logic proves too much, for it could just as easily be applied to any publicly conducted boycott.

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create a court emergency and thereby force the District government into passing Bill No. 5-128 is contradicted by the entire record," that "the use of emergency alternatives to the CJA lawyers * * * constituted no meaningful restraint on [their] power," that "no long-term alternative to the CJA lawyers would have solved the emergency situation," and that "without such alternatives, the role of the CJA lawyers as an essential component of the existing system was manifest" (*id.* at 205a-206a).

[38] Contrary to the court of appeals' surmise, the ALJ found expressly that (Pet. App. 194a (footnotes omitted)):

> [w]hile the hoopla organized by SCTLA did attract media attention and editorial support, there is no credible evidence that the District's eventual capitulation to the demands of the CJA lawyers was made in response to public pressure, or, for that matter, that this publicity campaign actually engendered any significant measure of public pressure.

The court of appeals felt it was not required to credit this finding because the Commission had not expressly adopted it in its own opinion (*id.* at 54a). However, the Commission did expressly adopt the ALJ's finding that the SCTLA lawyers had market power (note 37, *supra*), a fact that the court of appeals ignored.

The effect of its new exception would be virtually to swallow this Court's common sense rule that proof of adverse effects obviates proof of market power. Left unreversed, the approach would significantly complicate the litigation of "expressive price-fixing" cases and severely challenge the ability of prosecutors and defense counsel alike to ascertain in advance of full-blown litigation whether any instance of such price-fixing is lawful or not.

The success of any price-fixing boycott depends both upon the continued adherence of those who participate in the agreement, and upon the forebearance of those who, though not themselves parties to any agreement, might "break" the boycott if they elected to provide the good or service in question. Boycotts are often accompanied by public pronouncements from the participants that invoke the public interest in their cause and urge those who are not participating to support those who are. Thus, it will be open to successful boycotters to argue, as plausibly as SCTLA did here, that their success was merely a result of the "persuasive" effect of the boycott's "expressive" component upon those who might otherwise have blunted the boycott's effect. If one ignores, as the court of appeals did, the pragmatic analysis of power and effect performed by the ALJ and Commission, it is hard to imagine how any antitrust plaintiff could ever prove the existence of market power to the court's satisfaction, short of the "exhaustive and time consuming market definition exercise * * * endemic to merger litigation" that the court of appeals expressly disavowed (Pet. App. 55a).[39]

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[39] Indeed, the market power analysis decreed by the court in this case would often be far more difficult and time-consuming than that in most merger cases, which typically involve large markets with comparatively few companies. The typical "expressive price-fixing" case, by contrast, will usually involve a state or local service market (*e.g.*,

Likewise, the court of appeals' refusal to treat the City's payment of a higher legal service price as an adverse effect of the boycott reflects an approach that could be adopted in any case. Whenever the institutional target of a boycott acquiesces in the perpetrators' demands, it is always possible to argue that the target did so in response to "political" rather than "economic" power, and that it considered the boycotters' demands to be "in the public interest" or "politically correct," rather than that the target was "economically" coerced. Having capitulated to a price-fixing boycott orchestrated by a well-organized interest group, government officials might well wish only to announce that the public interest has been served, make peace with the only group of their constituents vitally interested in the matter (the economic interest group that has succeeded in its boycott), and put the matter behind them.[40]

The court of appeals recognized that "[d]istinguishing between the political and economic motives [of the par-

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CJA lawyers, Medicaid doctors, local pharmacies protesting state prescription reimbursement schemes) about which precise data do not exist and are difficult to obtain. Moreover, the number of different entities whose possible inclusion in such markets must be considered will often be enormous, given the court of appeals' apparent view here that the Commission must assess whether the market for indigent legal services included not only those who provide such services at the time of the boycott, but the nearly 14,000 other lawyers who possessed the statutory qualification (D.C. bar membership) to do so. See also, Kovacic, *Illegal Agreements With Competitors*, 57 Antitrust L. J. 517, 535 n.80 (1988) (discussing opinion below and difficulties of measuring market power in public procurement contexts).

[40] No doubt that is one reason why this Court has long held that neither acquiescence nor the knowing "wink" or "tacit[] approval" of government employees or other boycott targets bears on a boycott's legality. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. at 226-227.

ticipants in a price-fixing boycott] is a daunting task, even for a reviewing court" (Pet. App. 42a). But the court's decision would as a practical matter impose on antitrust enforcers or boycott victims the far more "daunting" task of proving the motives of nonparticipant bystanders who merely forebear to take affirmative action to break a boycott and the motives of the legislature and other government decisionmakers who capitulate to it—all in order to divine the "real" reason why a boycott succeeded.

Finally, even were the Commission able to intuit how the court of appeals intended it to measure "market power" in this case, its labors would not be at an end. For the court of appeals also instructed the Commission to determine "how much market power is sufficient to justify the condemnation of an expressive boycott" (Pet. App. 56a). The court of appeals did not explain how its command is to be obeyed. Whatever the court of appeals' opinion means, the inquiry it mandates is plainly beyond the competence of any agency or court to perform.

In rejecting, more than ninety years ago, the claim that the legality of price-fixing should turn on the reasonableness of the prices being fixed, Judge (later Mr. Chief Justice) Taft recognized that this inquiry would condemn the courts to "set sail on a sea of doubt" from which they might never return (*United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271, 284 (6th Cir. 1898), aff'd, 175 U.S. 211 (1899)). The court of appeals' untethered application of the *O'Brien* test, and its baffling standard for assessing market power, pose equivalent risks. This Court should reject them.

CONCLUSION

The judgment of the court of appeals should be reversed insofar as it vacates the decision of the Commission.

Respectfully submitted.

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